

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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PETER DELVECCHIA, *et al.*,

Plaintiffs,

v.

FRONTIER AIRLINES, INC., *et al.*,

Defendants.

Case No. 2:19-cv-01322-KJD-DJA

ORDER

Presently before the Court is Plaintiffs' Rule 72(a) Objection to the Magistrate Judge's August 5, 2022 Order on Motion for Independent Medical Examination (#202). The Defendants responded in opposition (#205).

I. Factual and Procedural Background

This case arises from a discrimination claim based on the separation of Plaintiff Peter DelVecchia ("DelVecchia") and his son, Plaintiff A.D. ("A.D.") on a Frontier flight. Plaintiffs are suing Defendant, Frontier Airlines ("Frontier"), claiming the airline racially profiled DelVecchia and A.D. when they forcefully separated the pair on the flight for suspected human trafficking. DelVecchia is white, and is the adoptive father of A.D., who is black. Plaintiffs claim A.D. was traumatized by the event, has been diagnosed with Post Traumatic Stress Disorder ("PTSD") and he suffers symptoms of fear, anxiety, apprehension, nightmares, nausea, and vomiting as a result. (#157).

On June 3, 2022, Defendants moved the Court to order A.D. to undergo a mental exam pursuant to Fed. R. Civ. P. 35 ("Rule"). (#180). Plaintiffs opposed that motion (#182), to which Defendants replied. (#183). Plaintiffs then filed a surreply in opposition. (#186) and Defendants responded to the surreply (#189). The magistrate judge issued an order on August 5, 2022, granting Defendants' motion in part and denying in part. (#195). Plaintiffs now bring this motion

1 objecting to the order and asking the Court to reconsider. (#202).

## 2 II. Legal Standard

3 Rule 72(a), in relevant part, states that “[a] party may serve and file objections to the  
4 [Magistrate Judge’s] order within 14 days after being served with a copy.... The district judge in  
5 the case must consider timely objections and modify or set aside any part of the order that is  
6 clearly erroneous or is contrary to law.”

7 “The clearly erroneous standard applies only to the magistrate judge’s factual findings while  
8 the contrary to law standard applies to the magistrate judge’s legal conclusions, which are  
9 reviewed de novo.” Columbia Pictures, Inc. v. Bunnell, 245 F.R.D. 443, 446 (C.D. Cal. 2007)  
10 (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)). “A magistrate judge’s  
11 order is ‘clearly erroneous’ if the court has a ‘definite and firm conviction that a mistake has  
12 been committed.” United States v. Desage, 229 F. Supp. 3d 1209, 1213 (D. Nev. 2017). “An  
13 order is contrary to law when it fails to apply or misapplies relevant statutes, case law, or rules of  
14 procedure.” Id.

## 15 III. Discussion

16 The Court is tasked with determining whether the magistrate judge’s order ruling on the  
17 examination for A.D. contained anything that was clearly erroneous or contrary to law. Rule 35  
18 states that the Court has discretion to order a party whose mental or physical condition is in  
19 controversy to submit to a mental or physical examination. Fed. R. Civ. P. 35(a). Rule 35  
20 requires the party requesting an examination to demonstrate the condition is “in controversy” and  
21 to show “good cause” warranting the examination. Pham v. Wal-Mart Stores, Inc., No. 2:11-cv-  
22 01148-KJD-GWF, 2012 WL 1957987, at \*6 (D. Nev. May 29, 2012), citing Schlagenhauf v.  
23 Holder, 379 U.S. 104, 118-19 (1964). The movant need not “prove his case on the merits in order  
24 to meet the requirements for a mental or physical examination.” Schlagenhauf, 379 U.S. at 119.

25 If the Court chooses to grant a motion for an examination, the order “must specify the time,  
26 place, manner, conditions, and scope of the examination, as well as the person or persons who  
27 will perform it.” Fed. R. Civ. P. 35(a)(2)(B).

28 Defendants moved the Court for an examination of A.D.’s mental condition because the

1 Plaintiffs put A.D.'s mental condition in controversy by claiming intentional infliction of  
2 emotional distress, PTSD and other symptoms, and severe emotional distress. (#157, #180, at 5).  
3 Defendants also claimed there was good cause to order an examination because they had retained  
4 a reputable doctor (Dr. Stephanie Holland) and the information cannot be obtained through other  
5 means. (#180, at 6). Defendants also requested that the examination last two days, be in-person,  
6 and consist of testing including, but not limited to, WISC, BASC, BDI II, CAPS-5, LEC-5, and  
7 PAI-A of A.D. Id. at 8. Plaintiffs would have access to the raw data generated from these tests.  
8 Id.

9 Plaintiffs opposed the motion and argued A.D.'s well-being is at risk and his health  
10 outweighs any possible benefits that could come from additional testing by Defendants' doctor.  
11 (#182, at 3). Plaintiffs also argued that Defendants improperly stated the conditions and scope of  
12 the exam under Rule 35 because the tests listed by the Defendants included no descriptions and  
13 were testing aspects of A.D.'s mental condition that were irrelevant to the PTSD diagnosis. Id. at  
14 4-5. Finally, Plaintiffs requested that if the Court did grant the motion, certain conditions should  
15 be in place to protect A.D. Id. at 6-7.

16 Defendants' reply argued that one of the purposes of Rule 35 is to "level the playing field in  
17 cases where physical or mental condition is at issue[.] Painter v. Atwood, No. 2:12-cv-01215-  
18 JCM-RJJ, 2013 WL 5428059, at \*2 (D. Nev. Sept. 26, 2013); (#183, at 2)). Defendants also  
19 argued it did properly state the conditions and scope of the examination, and proposed changes to  
20 the original motion. (#183, at 4). Defendants argued that the tests proposed were relevant and  
21 necessary to assess A.D.'s cognitive abilities, personality traits, learning abilities, and other  
22 characteristics to make up a full picture of A.D. Id. at 5. Defendants also disagreed with  
23 Plaintiffs' request that the examination be limited to the events that occurred on the Frontier  
24 flight because there was evidence of other, similar instances that could have affected A.D.'s  
25 mental condition. Id. at 6.

26 Plaintiffs filed an impassioned surreply and argued that the tests should be limited to PTSD  
27 exams because it is the only condition that meets the "in controversy" requirement of Rule 35  
28 and the other tests would only function as a "fishing expedition[.]" (#186, at 3-4). Plaintiffs

1 argued that the amount of time available for testing should be limited and that DelVecchia  
2 should be allowed to support A.D. during breaks without Dr. Holland present. Id. at 7-8.  
3 Plaintiffs also accused Defendants of repeatedly making misleading and false representations to  
4 both Plaintiffs and the Court. Id. at 2-3.

5 Defendants were granted leave to file a response to the surreply and argued again that the  
6 proposed tests are appropriate and that no misrepresentations or mischaracterizations were made.  
7 (#189).

8 The magistrate judge filed the order on August 5, 2022, granting in part and denying in part.  
9 (#195). The order considers both the Plaintiffs' and Defendants' briefing, and ultimately orders  
10 Dr. Holland perform an examination. Id. The order declared that all the tests proposed by  
11 Defendant be administered, as they were not overbroad, as well any "additional testing, if  
12 necessary, based on the results of the tests and if time permits." Id. at 6. The Court also allowed  
13 the exam to consist of questions about events prior to the Frontier flight at issue because  
14 "Frontier is entitled to learn whether A.D.'s emotional distress and PTSD are attributable only to  
15 the event taking place on its flight, or whether other instances—like being shouted at or having  
16 garbage thrown at them and his father—have contributed." Id. at 7.

17 The order also placed some limitations on the exam, including allowing A.D. to take a break  
18 during the exam outside the presence of Dr. Holland with DelVecchia, and not allowing Dr.  
19 Holland to question DelVecchia, A.D.'s siblings, teachers, social workers, therapists, or  
20 psychiatrist. Id. at 8.

21 Plaintiffs objected to the order, arguing the conclusions were clearly erroneous and contrary  
22 to law. (#202). Plaintiffs specifically objected to the examination as it relates to "the entirety of  
23 A.D.'s 'mental wellbeing[.]'" Id. at 5. This is because, as Plaintiffs state, the symptoms listed in  
24 the Third Amended Complaint (fear, anxiety, apprehension, nightmares, nausea and vomiting)  
25 are not separate from the PTSD diagnosis. Id. Plaintiffs also take issue with the scope of testing  
26 because it would allow Dr. Holland to question A.D. about experiences prior to the Frontier  
27 flight because "there is no evidence that A.D. had PTSD prior to stepping aboard Frontier's  
28 flight on March 28, 2019." Id. at 3. Plaintiffs also object to the order allowing any additional

1 tests not listed in the order which are up to the discretion of Dr. Holland and the time restraints.  
2 Id. at 6-7.

3 Defendants responded to the objection and argued that the order should stand as it did not  
4 contain anything clearly erroneous or contrary to law. (#205). The main thrust of the Defendants  
5 argument is that A.D.'s PTSD diagnosis is in dispute and Defendants should have the  
6 opportunity to discover more information regarding that purported diagnosis. Id. at 3. Defendants  
7 also argue the magistrate judge was correct in ordering additional testing not listed in the order if  
8 time permits because "Rule 35 does not require the party requesting an examination to fully  
9 describe the manner and conditions of the examination." Id. at 7.

10 The Court now finds that A.D.'s mental condition is surely in controversy, but the extent and  
11 cause of that condition is disputed. Defendants are therefore entitled to examine A.D. to both  
12 "even the playing field" and support Defendants' defense that any possible diagnosis of PTSD or  
13 other conditions are not entirely Defendants' fault, if at all. See Painter, 2013 WL 5428059, at  
14 \*2. Defendants have stated that "Frontier takes no position at this stage in the litigation as to  
15 whether A.D.'s alleged PTSD could have resulted from the subject incident, an accumulation of  
16 incidents, or whether it was even possible for A.D. to have suffered PTSD based on the  
17 allegations[.]" (#205, at 6). Prohibiting Defendants from performing their own examination to  
18 determine the existence or extent of PTSD would conflict with their chief defense. The Court  
19 understands the Plaintiffs' argument about the previous instances of discrimination being  
20 speculative but finds that the Defendants are entitled to question the causation and dispute the  
21 PTSD diagnosis.

22 Further, Plaintiffs allege there is no evidence that A.D. experienced symptoms of PTSD prior  
23 to the Frontier flight, and Plaintiffs will have every opportunity to explain that to a jury.  
24 Plaintiffs may also utilize vigorous cross-examinations, presentation of contrary evidence, and  
25 careful jury instructions. While the Court is also sympathetic to A.D. having to be reexamined  
26 and face more questions about the incident, the Court finds the Defendants are still entitled to  
27 their own examination as it pertains to their defense.

28 However, the Court also finds that, pursuant to the language of Rule 35(a), a court's order

1 “must *specify* the... scope of the examination[.]” Fed. R. Civ. P. 35(a)(2)(B) (emphasis added).  
2 Therefore, the Court holds that additional tests beyond what are listed in the magistrate judge’s  
3 order (WASI, BASC-3, CAPS-CA-5, LEC-5, and PAI-A) may be permitted only upon further  
4 motions establishing that specific additional testing will be essential to the presentation of  
5 Frontier’s defense.

6 IV. Conclusion

7 Accordingly, **IT IS HEREBY ORDERED** that Plaintiffs’ Rule 72(a) Objection to the  
8 Magistrate Judge’s August 5, 2022 Order on Motion for Independent Medical Examination  
9 (#202) is **DENIED**;

10 **IT IS FURTHER ORDERED** that the Order (#195) entered on August 5, 2022 is  
11 **AFFIRMED** and modified as specified in this order.

12 Dated this this 13<sup>th</sup> day of February, 2023.

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16 Kent J. Dawson  
17 United States District Judge  
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